

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SHAMROCK CARTAGE, INC.

and

Case 09-CA-219396

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS (IBT), LOCAL UNION NO. 413

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS/SUMMARY JUDGMENT**

On October 10, 2018, Respondent filed its motion requesting that the complaint issued in this matter be dismissed. Counsel for the General Counsel respectfully opposes Respondent's motion for the reasons stated below. Briefly put, Respondent's motion makes factually unsupported assertions that perfectly illustrate why a hearing in this matter is necessary.

I. Background

Shane Smith was an employee of Respondent and a prominent union supporter. He led a drive to organize Respondent's employees at two locations in Ohio and Respondent discharged him during the course of such campaign. Following investigation of a prior Board charge filed by IBT Local 413 (Charging Party) against Respondent in Case 09-CA-121821, a complaint issued and the parties entered into an informal Board settlement agreement on November 8, 2017. Pursuant to the agreement, Respondent agreed to reinstate Smith and to recognize the Charging Party as the exclusive representative of certain of its employees. On his returning to work, the Charging Party appointed Smith as its chief steward and invited him to be its employee representative at the bargaining table.

II. The Instant Charge and Complaint

Investigation of this charge revealed that on April 9, 2018, Smith's supervisor, Brian Williamson, threatened to put difficult and poorly performing employees on Smith's shift because of his support for the union's position at the bargaining table. On that same date, Smith reported to Williamson that the computer on his truck (supplied by Respondent's client Kraft) had an issue. Rather than address the issue himself, Williamson instructed Smith to contact the company responsible for troubleshooting such issues (PINC), thereby authorizing Smith to seek to resolve the issue independently. During the authorized call with PINC, Smith inquired about the status of another computer that had already been reported as having problems. Smith's inquiry resulted in PINC re-sending a purchase order (or quote) to Kraft that it had sent 2 months earlier. Williamson suspended Smith the same day - before notifying the Charging Party - and following a perfunctory investigation, terminated Smith. Respondent suspended Smith 1 day before it read the Notice to Employees to its employees pursuant to the settlement agreement in Case 9-CA- 121821.

In presenting its case to the Region that Smith should be terminated for his authorized contact with a company that troubleshoots employees' equipment, Respondent presented no evidence that Smith made any purchase or financially obligated any party. In fact, its reliance on this specious explanation for firing Smith without warning raises serious doubt as to the legitimacy of Respondent's asserted defense.

The Region concluded that Respondent terminated Smith due to its animus towards his union and Board activities based upon, among other things, the timing of Respondent's initial decision to fire him during the union organizing campaign, Respondent's other coercive conduct

during the organizing campaign ^{1/}, Williams' threat as noted above, the timing of Respondent's decision to fire Smith a *second* time right before reading the Notice from its earlier settlement with the Region, and the lack of any comparable circumstance under which any employee had ever before been disciplined or fired for similar conduct.

III. Respondent's Motion Should be Denied

Respondent has failed to provide a basis for granting either a motion for summary judgment or a motion to dismiss the case. Summary judgment is only appropriate when there are no genuine issues of material fact. See, e.g., *Laborer's Local 721 (Hawkins & Sons)*, 294 NLRB 166 (1989). Rather than present a cogent argument for summary judgment, Respondent's motion does the opposite: it highlights some of the very factual disputes that demonstrate why this complaint must be litigated, absent settlement by the parties. The pleadings in this matter and the assertions made in Respondent's own motion demonstrate that there are issues of material fact. Insofar as Respondent is making a motion to dismiss, "In ruling on a motion to dismiss under Sec. 102.24 of the Board's Rules, the Board construes the complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." *Detroit Newspapers Agency*, 330 NLRB 524, 525 fn. 7 (2000), and cases cited therein. Such standard resolutely dictates that Respondent's motion to dismiss be denied. The factual allegations of the complaint clearly make out violations of Sections 8(a)(1), (3), (4) and (5) of the Act and Respondent's premature and unsupported claims to the contrary are not facts – but rather are simply assertions that it will have the burden of proving at trial. Even if the Board

^{1/} Such alleged unlawful discharge and coercive conduct are pled in the Complaint and Notice of Hearing in Case 9-CA-121821.

were to accept such assertions as true, the summary of facts set forth above as well as the following more than support a finding of a violation and the need for remedial relief:

In its motion, Respondent asserts that, “Smith attempted to order from PINC, a vendor for Kraft.” Counsel for the General Counsel disputes this assertion and the evidence will show that Smith made no such attempt and that what contact he did make with PINC was authorized by his supervisor. The evidence will also show that Respondent’s assertion that Smith admitted to attempting to purchase equipment is so gross a mischaracterization as to be false.

Respondent also asserts that Section 6.13 of its handbook clearly prohibits Smith’s conduct: in addition to the fact that there is a dispute as to whether Smith even engaged in conduct described in 6.13, the evidence will further show that the handbook contains no provision prohibiting the conduct in which Smith actually engaged. Moreover, whether Respondent even applied this handbook policy to discharge Smith is itself a factual question best suited for resolution through a hearing. Further, Respondent’s reliance on the recent *Boeing* decision is misplaced: the complaint does not allege an unlawful rule. The existence and application of the purported rule cited by Respondent, which it has seized upon as an excuse for firing Smith, is a factual matter that goes directly to Respondent’s burden to show that it would have made the same decision to fire Smith even if he had not engaged in activities protected by the Act.

Respondent provided no legal support for its proposition that it was not obligated to bargain over its decision to take Smith out of service because it suspended him with pay. Contrary to Respondent’s assertions, and per *Total Security*, 364 NLRB No. 106 (2016) (cited by Respondent), Respondent was obligated to notify and bargain with the Charging Party about its discretionary discipline and its effects *before* actually suspending him. Respondent is free to

present facts in support of any mitigating or exigent circumstances at the hearing. However, summary judgment (and/or dismissal) is wholly inappropriate.

IV. Conclusion

The complaint raises factual and legal disputes necessitating a hearing on the merits. The pleading create genuine issues of material fact and the complaint clearly states a claim on which relief may, and should, be granted. Accordingly, Counsel for the General Counsel respectfully requests that Respondent's motion be denied.

/s/ Joseph Tansino

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CERTIFICATE OF SERVICE

October 12, 2018

I hereby certify that I served the Counsel for the General Counsel's Opposition to Respondent's Motion to Dismiss Summary Judgment on the following parties by electronic mail today at the following email addresses:

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